CHE DIN BIN AHMAD v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Agil Barakbah J.) October 23, 1975]
[Alor Star — Criminal Appeal No. 35 of 1974]

Criminal Law and Procedure — Appeal — Application to adduce additional evidence — Discretion of court — Principles to be applied — Criminal Procedure Code (F.M.S. Cap. 6), s. 317.

Evidence — Additional evidence — Application to adduce — Principles to be applied

The appellant, who had been convicted on a charge of corruptly accepting an illegal gratification under section 4(a) of the Prevention of Corruption Act, 1961, applied for additional evidence to be adduced at the hearing of the appeal.

Held: (1) the principles for the exercise of the court's discretion have been summarised by Lord Parker C.J. in the case of *R.* v. *Parks*(3) as follows:

(a) the evidence sought to be called must be evidence which was not available at the trial;

(b) the evidence must be relevant to the issue;

(c) it must be credible evidence in the sense of being well capable of belief;

(d) the court, will, after considering that evidence go on to consider whether there has been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

(2) the conditions so propounded are cumulative and it was for the appellant to satisfy the court that all four conditions are fulfilled. As he had failed to do so in this case, the application must be dismissed.

Cases referred to:-

(1) *Mohamed bin Jamal* v. *Public Prosecutor* [1964] M.L.J. 254, 255.

(2) *R.* v. *Jordan* (1956) 40 Cr. App. R. 152, 154.

(3) *R.* v. *Parks* [1961] 3 All E.R. 633, 634.

(4) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.

CRIMINAL APPEAL.

Triptipal Singh for the appellant.

Shaik Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the respondent.

Syed Agil Barakbah J.: This is an application under section 317 of the Criminal Procedure Code for additional evidence to be adduced at the hearing of the appeal. The evidence intended to be adduced is from one Mohd. Yusof bin Ladin to the effect that Abdul Jalil bin Nordin (PW8) had committed perjury at the trial of the appellant before the President, Sessions Court, Kangar, on April 3, 1974. The charge against the appellant was for corruptly accepting a gratification under section 4(a) of the Prevention of Corruption Act, 1961. He was found guilty of the charge by the learned President, convicted and sentenced to 6 months imprisonment. In addition a penalty of $130 under section 13 of the Act was imposed. Against this conviction and sentence he has now appealed. At the trial the appellant was represented by counsel.

The brief facts of the case were that two trawler boats belonging to the complainant Abu bin Suleiman (PW6) were detained by the appellant, a police corporal attached to the Marine Branch, Kuala Perlis, and the taikong and crew were charged for operating them without licence. While PW6 was seating in a coffee shop it was alleged that the appellant went and spoke to him and threatened to make further arrests if PW6 did not pay him a sum of money. Thereafter PW6 consulted his younger brother and after seeing a lawyer he went and made a report to the Anti-Corruption Agency. Subsequently on November 9, 1973 as pre-arranged, the appellant went to a coffee shop at Kuala Perlis and sat in a room with one A.S.P. Ani. Subsequently the complainant came into the room and handed an envelope containing $130 marked notes under the table to the appellant. After taking the envelope the appellant left the room and returned subsequently followed by Abdul Jalil (PW8). The complainant then left the room, gave a signal to two Anti-Corruption Agency officials who came into the room. They searched the three persons and subsequently found the envelope containing the marked notes in the pocket of Abdul Jalil. (PW8). According to PW8 the appellant handed the envelope to him for safe-keeping when both of them went out of the shop earlier.

In his defence the appellant admitted the complainant came to see him in the coffee shop but that no envelope containing the money was ever passed to him by PW6. He only stated that after PW6 asked him whether he could be of any help regarding the boats that were detained, the appellant replied in the negative and advised him to see a lawyer.

A.S.P. Ani appeared as a defence witness. According to him he did not see any envelope being passed but he explained, as accepted by the learned President, that he was fully occupied with pouring beer into glasses and did not pay any attention.

The point in issue relates to the evidence of PW8 on whom the marked notes were found. Further evidence that is sought to be adduced was for the purpose of rebutting his evidence given at the trial during examination-in-chief, *viz.* "Before that day I did not know PW6". There was no cross-examination on that issue. In the affidavit attached to the Notice of Motion the appellant states that after the appeal had been filed he came to know that PW6 and PW8 had known each other before he was arrested. A statutory declaration sworn on March 15, 1975, by Mohd. Yusof bin Ladin is also annexed. It states, *inter alia*, that he knows PW6, PW8 and the corporal and has seen PW6 and PW8 many times together having food at a stall next to his in Kuala Perlis before the arrest of the appellant on the corruption charge. From his observation they are good friends. It was submitted by the learned counsel for the appellant had that been known earlier before the trial, PW8 could have been impeached on the matter and the learned President would not have accepted his evidence in toto as he has done in this case wherein he stated in his grounds of judgment that he was fully convinced that PW8 was a witness of truth. Further, since this matter came to light only after the trial, it could not have been brought out earlier during the trial. Hence, if that could be proved by adducing further evidence, then PW8 had committed perjury at the trial.

Now, section 317 of the Criminal Procedure Code gives a discretion to the judge in hearing any appeal to allow additional evidence if he thinks such is necessary. In considering such application the appellate

court has always adopted the attitude that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the court is ever willing to listen to additional evidence. (*Mohamed bin Jamal* v. *Public Prosecutor*,[1] per Thomson L.P., quoting Hallett J. in the case of *R.* v. *Jordan*[2]). It is clear, therefore, that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. The matter is left entirely to the discretion of the court. The principles which the courts have decided in the course of years may be summarised according to the passage from the judgment of Lord Parker C.J. in the case of *R.* v. *Parks*: —[3]

"(i) the evidence sought to be called must be evidence which was not available at the trial;

(ii) the evidence must be relevant to the issues;

(iii) it must be credible evidence in the sense of being well capable of belief; and

(iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

With regard to the first condition, in the light of the appellant's denial that he received the envelope containing the marked notes from PW6 on the day in question, the defence seems to suggest that it was a frame-up in that it was the complainant (PW6) who had passed the envelope to PW8. That, to my mind, became a vital issue to the defence. The fact that the marked notes were found in the trouser pocket of PW8 was known to the appellant when the Anti-Corruption Agency officers searched their persons in the room in the coffee shop. In order to raise this issue successfully it was necessary for the appellant, or for that matter, his counsel, to make enquiries regarding the relationship between PW6 and PW8, in particular whether they know each other so well and intimately as to enable both of them to frame up a case against the appellant. The matter should be topmost in their minds from the beginning. This evidence was therefore capable of being made available at the trial if the appellant had exercised due diligence.

With regard to the second condition, whether the evidence is relevant to the issues depends on the facts and circumstances of the case. The same applies to the third and fourth conditions. The contention of the appellant's counsel is that it is highly relevant to the issue because had it been known earlier that PW6 and PW8 knew each other, PW8's credit could be impeached during cross-examination at the trial and his evidence would not carry much weight. However, other available evidence has to be considered particularly that of PW6 and even that of defence witness A.S.P. Ani. (DW2). In this regard I agree with respect with the learned Deputy Public Prosecutor that even if PW8's credit is impeached on that issue, the rest of his evidence, especially that which is corroborated by other witnesses, could not be discarded. Now, the proposed additional evidence is of such a nature that it ought not to be accepted as credible without the declarant being put to cross-examination. The prosecution would then have the right to call witnesses to rebut it. The procedure would be cumbersome and the result might turn out to be evidence that may not be well capable of belief. It does not fall within the most exceptional circumstance that would lead the appellate court to consider it being necessary for inclusion. The prosecution evidence shows that PW8 knew the appellant well and was a good friend of his. He accompanied the appellant in his car from Kuala Perlis to Kangar on the day in question and subsequently he followed the appellant into the shop where he met A.S.P. Ani. That was corroborated by the evidence of PW6 and, the latter version, by A.S.P. Ani. Further, there was evidence to show that the appellant left the room soon after PW6 had handed him the money from under the table and according to PW8 that was the time when the appellant handed him the envelope in a passageway outside the shop for safe-keeping and thereafter he followed the appellant back into the room. PW6 observed them coming out and then going in again although he did not see the money being passed. The learned president accepted the evidence as being true and probable. In my view if it was a frame-up PW6 could have easily said that he saw PW8 handing the envelope to the appellant. Even DW2 in his testimony stated that PW8 joined them in the room. The appellant asked for another glass and PW8 poured beer into the glass. This witness, however, appeared not to have noticed anything much as he was more engrossed in pouring beer into his glass. He admitted that the room was very small, enough for one table and four chairs, that the appellant sat about 3 feet away from him and PW6 earlier sat near the appellant before leaving the room. This witness does not seem to be of much help to the defence and even with the inclusion of the additional evidence, it is my considered judgment that according to the facts and surrounding circumstances of this case, no reasonable doubt would arise in favour of the appellant. Under the Act it is incumbent on the prosecution to prove, *inter alia*, that the appellant did actually receive the gratification before the presumption under section 14 that the gratification has been received corruptly is invoked. Then the onus is on the appellant to prove to the contrary according to the principle adopted by the Privy Council in *Public Prosecutor* v. *Yuvaraj*.[4] It is not incumbent on the prosecution to prove that the money was subsequently found in the possession of the appellant so long as the trial court is satisfied from the evidence that it was the appellant who received the money. The learned trial president came to that conclusion, called for the defence and was fully satisfied that the defence had failed to rebut the presumption.

It should be observed that the conditions propounded in *R.* v. *Parks*, *supra*, are cumulative and not in the alternative. It is for the appellant to satisfy this court that all the four conditions are fulfilled. Having failed to do so, I have no alternative but to dismiss the motion.

Motion dismissed.